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PROTECTION OF PROPERTY RIGHTS AND  
DUE PROCESS OF LAW  
IN THE JAPANESE CONSTITUTION

NOBUSHIGE UKAI\* and NATHANIEL L. NATHANSON\*\*

I. THE RELATIONSHIP BETWEEN THE JAPANESE AND AMERICAN  
DUE PROCESS CLAUSES

*A. The Issue*

Some writers find a reflection of the due process clauses of the fifth and fourteenth amendments of the United States Constitution in Article 31 of the 1946 Japanese Constitution. Article 31 provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." Obviously there are disparities as well as similarities between this article and the American due process clauses.<sup>1</sup> Since the Japanese Constitution was framed under the direction of the Supreme Command Allied Powers (SCAP), during the allied occupation, the similarities are not surprising. In the words of an Indian Supreme Court judge:<sup>2</sup>

One of the characteristics of the [Japanese] Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled, "Rights and Duties of the People," which provided for the first time an effective "Bill of Rights" for the Japanese people.

Many of those articles reflect other provisions of the American Bill of Rights. Consequently, the natural surmise is that Article 31 of the

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\*\* Professor of Law, Northwestern University. Visiting Professor of Law, 1968-69, University of Washington. The substance of this article is due entirely to the scholarship and thought of Professor Ukai. My function has been principally to act as a "go-between" for Professor Ukai and the Law Review editors who have been extremely helpful.—N.L.N.

<sup>1</sup> U.S. CONST. amend. V: "No person shall be... deprived of life, liberty, or property, without due process of law;..." U.S. CONST. amend XIV, § 1: "No state shall... deprive any person of life, liberty, or property, without due process of law;..."

The English translation of all of the Japanese constitutional articles cited in this paper are taken from THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES (Supreme Court of Japan, 1958). This translation is not official, i.e., the Japanese text is the only official version of the Constitution. This fact should be kept in mind when comparatively analyzing the United States and Japanese constitutions since the translation may or may not accurately represent the official Japanese text.

<sup>2</sup> Judge Fazl Ali in *Gopalan v. State of Madras*, 37 All India Rptr. 27, 57 (Sup. Ct. 1950).

Japanese Constitution is derived from the due process clauses of the United States Constitution.

Nevertheless, even if one clause is derived from the other, there are reasons for questioning whether their meanings are therefore substantially the same. The differences in wording are significant. But more important is the divergent historical development of the two provisions.

### *B. Historical Development of Due Process in the United States*

The interpretation of due process in American constitutional history may be divided into four stages. During the first period, before the American Civil War, it was limited almost entirely to matters of procedure. As Mr. Justice Story said in his *Commentaries*, the fifth amendment "in effect affirms the right of trial according to the process and proceedings of the common law."<sup>3</sup>

The second period of interpretation began after the Civil War and the adoption of the fourteenth amendment. During this period a broader view of the due process clause was urged. Thus when a law conferring a monopoly on the slaughtering of livestock was challenged as violative of due process, this view was supported by at least two of the dissenting justices.<sup>4</sup> Gradually this "substantive" view of the due process clause gained additional support, and in 1897 the Court unanimously held that it was a violation of due process for a state to forbid its residents from making contracts with out-of-state insurance companies.<sup>5</sup> More important than the Court's decision was its reasoning, which embraced this statement:<sup>6</sup>

The liberty mentioned in that amendment [the fourteenth] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

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<sup>3</sup> J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1833), quoted by B. SCHWARTZ, THE RIGHTS OF PROPERTY 23 (1965).

<sup>4</sup> Compare *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 111 (1872), dissenting opinion of Justice Bradley, with the concurring opinion of Justice Bradley in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 760 (1883).

<sup>5</sup> *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>6</sup> *Id.* at 589.

The third stage covers the period in which this broad view of the substantive reach of the due process clause dominated the scene and resulted in the invalidation of many laws, such as those establishing maximum working hours, minimum wages, and various forms of price control and licensing.<sup>7</sup>

The fourth period began in the early days of the New Deal and extends to the present. During this period the use of due process as a substantive restriction upon the regulation of the economy has been largely suspended or abandoned.<sup>8</sup>

It seems quite likely that the lawyers on General MacArthur's staff who drafted the Japanese Constitution were strongly influenced by the legal developments of the New Deal and were in favor of the due process interpretation of the fourth period. Furthermore, some Japanese scholars assert that Article 31 of the Japanese Constitution should be interpreted as limited to procedural due process not only as a direct inference from the American experience, but also on the basis of Japanese social and economic development.<sup>9</sup>

### *C. The Significance of Differing Phraseology*

The deletion of "property" and the substitution of "procedure established by law" for "due process of law" characterize the Japanese Constitution when compared with that of the United States. This change is also seen in the Indian Constitution.<sup>10</sup> Both were patterned more or less closely on the due process clauses of the United States Constitution. Article 31 of the Japanese Constitution mentions only "life and liberty," whereas the fifth and fourteenth amendments of the United States Constitution use the phrase "life, liberty and property." Article 21 of the 1948 Indian Constitution, closely resembling the Japanese clause, provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Apparently the judges of the Indian Supreme Court attach considerable significance to the similarity in expression of the Indian and Japanese provisions and their common departure from the American. For

<sup>7</sup> The outstanding examples were *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>8</sup> C. SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 107 (1946).

<sup>9</sup> T. MIYASAWA, *KEMPŌ* (Constitution) 400, in *HŌRITSUGAKU ZENSHŪ* (1959); H. Tanaka, *Kempō 31 jō (iwayuru tekihō tetsuzuki jōkō ni tsuite)* (On Article 31 (the so-called due process clause)), in 8 *NIHONKOKU KEMPŌ TAIKEI* 165-200 (1965).

<sup>10</sup> Durga Das Basu, *Limitations of Fundamental Rights—with Special Reference to the Constitutions of U.S.A., India and Japan*, *KEMPŌ CHŌSAKAI* 92 (1959).

in 1950 the Supreme Court of India sustained the validity of the Preventive Detention Act partly on the ground that "the Constituent Assembly had before it the American article and the expression due process of law but they deliberately dropped the use of that expression from our Constitution."<sup>11</sup>

1. *Significance of the Omission of "Property."*—Let us consider more fully the significance of this difference in phraseology so far as Japanese constitutional law is concerned. Considering first the omission of the word "property," it should be noted that the rights of property are explicitly protected by other provisions of the Japanese Constitution. Article 29 in particular contains three important stipulations:<sup>12</sup>

1. The right to own or to hold property is inviolable.
2. Property rights shall be defined by law, in conformity with public welfare.
3. Private property may be taken for public use upon just compensation therefor.

It is natural to surmise that the word "property" was omitted from Article 31 because property rights are explicitly protected in Article 29. Indeed, substantially the same guarantees and qualifications of property rights now included in Article 29 were originally set forth in three separate articles of what is frequently referred to as the MacArthur draft of the Constitution. Thus the guarantees of property rights and personal liberties which were treated together in the fifth amendment of the American Constitution were deliberately placed in separate articles in the Japanese Constitution. It must be remembered, however, that the line between property and personal rights is not always distinct. Thus the provision of Article 22 which guarantees to every person the right "to choose his occupation to the extent that it does not interfere with the public welfare" and the provision of Article 28 which states that "[t]he right of workers to organize and to bargain and act collectively is guaranteed" may be thought of in part as protection of one's property interest in his own labor.

It is also noteworthy that the Japanese Constitution states in Article 13 that the "[r]ight to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." This article may be regarded as a legacy from Thomas Jefferson who

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<sup>11</sup> *Gopalan v. State of Madras*, 37 All India Rptr. 27 (Sup. Ct. 1950).

<sup>12</sup> JAPANESE CONST. art. 29.

gave John Locke's phrase "life, liberty and property" a more humanistic flavor by substituting "pursuit of happiness" for "property," when he transplanted it into the Declaration of Independence.

The foregoing discussion suggests that the omission of the word "property" from Article 31 was not intended to deprive property interests of a substantial measure of constitutional protection. It is perhaps more open to debate whether such protection is to be achieved through Article 31 itself, or only through other provisions of the Constitution.

2. *Significance of "Procedure Established by Law."*—There is historical support for the view that the substitution of "procedure established by law" for the American phrase "due process of law" is not of great significance. Coke in his *Institutes* asserted that the phrase "law of the land" used in the Magna Carta is equivalent to "due process of law."<sup>13</sup> The Indian Supreme Court, on the other hand, took the view that the deliberate omission of the word "due" from Article 21 of the Indian Constitution lent strength to the contention that the reasonableness of a law was not a justiciable question under the Indian Constitution.<sup>14</sup> It is also of some interest that the original draft of the Japanese Constitution submitted to the Japanese Government by SCAP used the phrase "procedure established by the Diet" instead of "procedure established by law." Later the Japanese Constituent Assembly substituted the word "law" for "Diet," but since there is no record left, we do not know why this change was made.<sup>15</sup>

## II. THE MEANING OF ARTICLE 31

### A. *The Issue*

Broadly speaking, there are three issues which are decisive in the interpretation of Article 31:

- (1) Is it limited to procedural due process, or does it include substantive questions as well?

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<sup>13</sup> B. SCHWARTZ, *supra* note 3, at 24.

<sup>14</sup> Chief Justice Kania in *Gopalan v. State of Madras*, 37 All India Rptr. 27, 39 (Sup. Ct. 1950).

<sup>15</sup> It should be noted that the official Japanese text reads in part, "*hōritsu* no sadameru tetsuzuki" ("procedure established by *statute*"). That is, the official text does not use "*hō*" (equivalent to "law"), but instead uses "*hōritsu*" ("statute"). It is apparent from other contexts of the Constitution that "*hōritsu*," as used in the Constitution, means the acts (statutes) of the Diet.

The Assembly made another change in the SCAP draft which originally stated: "No person shall be deprived of life or liberty, nor shall any criminal penalty be

- (2) Is it limited to criminal sanctions or can it be extended to administrative sanctions as well?
- (3) Does it control the content of the law or can it be satisfied so long as the forms of law are provided, irrespective of their fairness or reasonableness?<sup>16</sup>

The narrowest interpretation views Article 31 as limited to the guarantee of criminal procedures stipulated in laws passed by the Diet; the broadest interpretation views it as including administrative as well as criminal sanctions, applying to substantive as well as procedural matters, and requiring not only that there be a law, but also that the law be just.

In Japan, scholars have a variety of views ranging from the narrowest to the broadest.<sup>17</sup> Some believe that Article 31 means that substantive as well as procedural requirements must be established by law, but that only the procedural requirements must conform to natural justice or due process. Others believe that both procedural and substantive matters must be stipulated by law, but in neither case are the courts to adjudicate the validity of their content, except insofar as they may contravene some other more specific provision of the Constitution.

When it was discussed in the Constituent Assembly, Mr. Kimura, then Minister of Justice, in the course of answering questions from the members, said that Article 31 controlled not only criminal but also administrative matters and not only procedural but also substantive stipulations.<sup>18</sup> This statement was an expression of opinion by the

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imposed..." During subsequent discussions, the word "other" was inserted, changing the phrase to "any other criminal penalty." It might be deduced from this modification that the protection against deprivation of life and liberty is confined to criminal proceedings and may not be extended to administrative limitations. The significance of this change depends upon the importance given the exact wording of the Constitution and the original intent of those who framed and approved it.

<sup>16</sup> For an American reader, the terms procedural and substantive due process have a connotation somewhat different from that presented in the three issues. The "substantive questions" in issue (1) involve questions of the justness of the laws and are largely synonymous with the "content of the law" in issue (3). The first issue differentiates between this sense of "substantive" due process and "procedural" (*e.g.*, adequate notice, unbiased judge, etc.) as seen from the individual's viewpoint. The third issue is framed from the legislative viewpoint and contrasts an investigation of the just content of the law with the more limited question of whether the law is duly enacted.

<sup>17</sup> See, *e.g.*, T. MINOBE, *NIHONKOKU KEMPŌ GENRON* (Principles of the Constitution of Japan) 177 *et. seq.* (1952). Government representatives took the position that Article 31 is limited to procedural requirements. OKADA, *NIHONKOKU KEMPŌ SHINGI YŌRON* (Excerpts of the minutes of the constitutional Diet) 341 (1947).

<sup>18</sup> 2 *CHIKUJŌ NIHONKOKU KEMPŌ SHINGIROKU* (The minutes of the Japanese constitutional Diet) 725 (S. Shimizu ed. 1962).

presiding government official suggesting that the scope of Article 31 was broader than its exact wording.

This background indicates the vagueness of legislative intention existing on the part of the Constitution makers. It is not too clear whether they had in mind the American due process stipulation, let alone the historical development of its interpretation. Professor Hideo Tanaka has stated that the members of the SCAP staff intended to avoid the broad interpretation of the due process clause, taking a lesson from the American experience of the turn of the century.<sup>19</sup>

Be that as it may, the situation in Japan is somewhat different from that in the United States. Japan still requires stronger guarantees than the West, lest the lack of the historical background for freedom should prove a fatal defect in the whole constitutional structure of its society. Therefore the broadest interpretation of Article 31 should be favored, including the implications of due process. At the same time, certain inherent limitations on the exercise of judicial power should be recognized, such as the requirement of justiciability and the avoidance of purely political questions.

### *B. Judicial Interpretation*

The first few cases which involved Article 31 were concerned with problems of delegated legislative authority. These cases dealt with the imposition of criminal penalties, including (a) Cabinet and Ministry orders, (b) rules of the National Personnel Agency pertaining to the civil service, and (c) local by-laws or ordinances. Although the particular type of delegation is different in each of these situations, the general principle is the same—so long as the authority to issue the regulations is explicitly delegated by the legislation, and the regulations issued are within the limits of the delegation, they are valid.

The first case of this type concerned a delegation under the Food Control Law.<sup>20</sup> The law itself explicitly provided for delegation of controls over the distribution of food through cabinet order. The Cabinet order in turn delegated control over the transportation of staple foods to the Minister of Agriculture, to be enforced by such penalties as were stipulated in the law. The petitioner claimed that the delegation of authority to include penalty provisions in cabinet orders

<sup>19</sup> H. Tanaka, *supra* note 9, at 186.

<sup>20</sup> *Shokuryō kanrihō* (Food control law) (Law No. 40, 1942). The case is *Japan v. Sugioka*, 5 Saikō saibansho keiji hanreishū [hereinafter cited *Keishū*] 2463 (Sup. Ct., G.B., Dec. 5, 1951).



was explicitly provided for in Article 73(6), as an exception to Article 31, and was therefore to be strictly limited to that form of order; consequently the cabinet order could not delegate to a lower form of order the definition of acts to be punished under the law. The Supreme Court rejected this contention, holding that the law implied authority to sub-delegate by cabinet order to other forms of order. The only limitation was that the framework within which lower orders could control must be stipulated by the cabinet order. Penalties stipulated by the law were not affected.

The second case arose under the National Civil Service Law.<sup>21</sup> The statute provided that political actions of civil servants should be restricted in accordance with regulations issued by the National Personnel Agency, violations of such regulations to be punishable in accordance with provisions of the statute. Personnel Agency Rule 14-7 defined the meaning of "political acts" and "political purposes" as used in the statute. It said, *inter alia*, that political purposes include support of or opposition to a particular candidate in an election for public office, and that political action includes utilization of the title or authority of public office and other public or private influence. The penalty for violation was that stipulated in the statute. The Supreme Court, after analyzing the rule, held that it was not substantively unconstitutional and did not transgress the limits set forth in the statute. Consequently, there was no occasion for the application of Article 31 of the Constitution.

The third case concerned the validity of a city ordinance prohibiting various forms of vice.<sup>22</sup> The Supreme Court, relying on precedent, stated that the delegation of the power to prescribe penalties through local by-laws was not contrary to Article 31, and therefore not unconstitutional. The penalty for violation of the ordinance or by-law was provided for by the statute<sup>23</sup> which established a maximum of two years' imprisonment and 100,000 yen fine. But the exact delegation was different here than in the previous cases because the statute established only the limits of the penalty, permitting each by-law to stipulate the exact penalty for its violation within those limits.

In general the above cases discussed the propriety of defining criminal conduct through forms of law other than a statute passed by the

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<sup>21</sup> *Kokka kōmūinhō* (National civil service law) (Law No. 120, 1947). The case is *Japan v. Onakano*, 12 Keishū 1272 (Sup. Ct., May 1, 1958).

<sup>22</sup> *Japan v. Kurokami*, 13 Keishū 450 (Sup. Ct., April 23, 1959).

<sup>23</sup> *Chihō jichihō* (Local government law) art. 14(5) (Law No. 67, 1947).

Diet; this problem can be solved by application of the general theory of delegated legislative authority.

Now we turn to cases presenting the question whether the content of a law complies with the principle of Article 31.

1. *Lower Court Cases.*—There have been a few lower court decisions which struck down statutes because, while following the form of law, the statutes were thought to be in conflict with the fundamental idea of due process implied in Article 31. One example is a decision of the Osaka District Court, rendered in 1962, holding invalid a provision of a law controlling possession of guns, swords and similar weapons.<sup>24</sup> The provision in question made it a crime not to report the acquisition of guns immediately. This provision was declared invalid because the word "immediately" was considered too indefinite and vague.

Another decision of the Osaka District Court held invalid a provision of the Local Government Employees Law which prohibited completely, on pain of criminal punishment, all strikes by local government employees.<sup>25</sup> The Court concluded that the law violated Article 18 (involuntary servitude) and Article 28 (the right to organize and bargain collectively) because it prohibited all strikes, absolutely and indiscriminately. Moreover, because there was no reasonable or substantial ground for prescribing punishment in all such cases, it also violated Article 31.

Similarly, in the well-known "Sunakawa Case" involving the United States-Japan Security Treaty, the Tokyo District Court declared invalid as a violation of Article 31 of the Constitution a special penal law based on the executive agreement between the United States and Japan, because it imposed substantially heavier punishment than that imposed by the general Misdemeanor Law for similar offenses.<sup>26</sup> The court reasoned that there was no justifiable ground for such a distinction if the stationing of American forces in Japan was in violation of Article 9 of the Constitution, as the court found.

Finally, the action of the warden of a prison prohibiting a convicted prisoner awaiting the death penalty from subscribing to a newspaper

<sup>24</sup> *Japan v. Kiriya*, 4 Kakyū saibansho keiji sanbanreishū [hereinafter cited Kakyū keishū] 684 (Osaka Dist. Ct., July 14, 1962), *rev'd*, 15 Kōtō saibansho keiji hanreishū 649 (Osaka High Ct., Dec. 10, 1962). However, with these cases in mind, the stipulation of the law was later revised to read "within 20 days," instead of "immediately."

<sup>25</sup> *Japan v. Katayama*, 6 Kakyū keishū 309 (Osaka Dist. Ct., Mar. 30, 1964).

<sup>26</sup> *Japan v. Sakata*, 1 Kakyū keishū 776 (Tokyo Dist. Ct., Mar. 30, 1959). A translation of the Supreme Court decision which reversed this case is contained in J. MAKI, *COURT AND CONSTITUTION IN JAPAN* 298-361 (1964).

was declared invalid by the Osaka District Court to be a violation of the spirit of Article 31 of the Constitution.<sup>27</sup>

Although these cases show a strong appreciation on the part of some lower courts of the importance of safeguarding the fundamental rights of the people, it is obvious that this "due process" theory of Article 31 will not be a panacea for all the mistakes of government. This is particularly evident since the higher courts did not sustain the decisions of the district courts just mentioned. Thus the question whether the theory of "due process" has been imported into the Japanese Constitution must be confronted.

2. *Supreme Court Cases.*—This question was considered by the Supreme Court in a decision rendered in November of 1962.<sup>28</sup> The Court held unconstitutional and void a statutory provision for the forfeiture of property used in smuggling but allegedly owned by an innocent third party. The defendants had conspired to export goods illegally to Korea; without permission from the customs authority they loaded a ship with cargo and weighed anchor, but a storm turned them back into port, resulting in the failure of their plan. The courts of first and second instance, following earlier precedents of the Supreme Court, did not discuss the validity of Article 83(1) of the Customs Law (*Kanzeihō*). The Supreme Court reversed the lower court decision and held the statutory provision invalid.<sup>29</sup> The statute did except from forfeiture goods owned by innocent third parties; however, it did not provide any method of notice to them or opportunity for them to present their defenses.

The Supreme Court stated that forfeiture of the property of an innocent third party was extremely unreasonable if no opportunity for

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<sup>27</sup> *Son v. Warden of Osaka Prison*, 9 Gyōsei jiken saibanreishū 1662 (Osaka Dist. Ct., Aug. 20, 1958).

<sup>28</sup> *Japan v. Kunihiro*, 16 Keishū 1577 (Sup. Ct., G.B., Nov. 28, 1962).

After the decision of the Supreme Court nullifying Article 118 of the Customs Law as applied to property owned by third parties, the statute was supplemented by the Emergency Measure on Confiscation Procedure (Law No. 138, July 12, 1963). This law provides that in the case of forfeiture of property owned by those other than the defendants, the third parties are to be notified by the public prosecutor of all the particulars of the case and of their right to participate in defense of their interests. If it is impossible to give personal notice because the whereabouts of the third party is unknown or for some other reason, an appropriate public notice is to be published in the public gazette and newspapers and also on the bulletin board of the prosecutor's office. The statute also provides the procedure for participation in the proceedings by the third parties.

<sup>29</sup> The Customs Law was amended in 1954 (Law No. 61); however, since the case arose prior to 1954, article 83(1) of the old law was at issue.

In the first of the smuggling cases, 14 Keishū 1574 (Sup. Ct., G.B., Oct. 19, 1960), the Court denied an appeal based on violation of the rights of third parties. How-

notice and presentation of his defenses was afforded him. The Court concluded:<sup>30</sup> "Since there is no stipulation in Article 83(1) or in the Articles of Criminal Procedure about these matters, it is contrary to Articles 31 and 29 of the Constitution to confiscate property owned by a third party."<sup>31</sup>

The position taken by the Supreme Court in this case seems to be a long step toward the Western idea of procedural due process. Indeed the principle that fair procedure is required by natural justice seems to be clearly accepted by the Japanese Supreme Court.

This decision also seems to mean that the former minority has now become the majority in giving a broader interpretation to Article 31. As Mr. Justice Harlan said in his dissent in *Poe v. Ullman*:<sup>32</sup>

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Perhaps the fact that the opinion of the Japanese Supreme Court is changing shows a similar trend in the development of Japanese law.

ever, seven justices dissented. During 1960, three justices from the majority and two from the minority retired. In the 1962 case, four of the new appointees joined the previous minority, while one joined the previous majority. Thus, the previous minority became the majority. On the particular point concerning the right of the accused to urge the rights of third parties, the majority in the 1962 case stated:

Therefore, it is natural that the accused, against whom the forfeiture was ordered, should be allowed to appeal to the Supreme Court on the ground that the decision of forfeiture is unconstitutional, even in the case of property owned by a third party, since it is an additional penalty imposed on the accused. Moreover, such a remedy is all the more appropriate because it is clear that the accused's rights are affected insofar as he is deprived of possession of the property, put in the position of not being able to use it or profit from it, and above all, subjected to the danger of a demand from the third party whose property is being forfeited. It is therefore appropriate to overrule the decision rendered by the Grand Bench of this Court on October 19, 1960, which is in conflict with the present decision.

16 Keishū 1577, 1581 (Sup. Ct., G.B., Nov. 28, 1962).

<sup>30</sup> Japan v. Kunihiro, 16 Keishū 1577, 1580 (Sup. Ct., G.B., Nov. 28, 1962).

<sup>31</sup> In a supplementary opinion, Judge Irie stated:

The guarantee of due process of law in Article 31 of the Constitution does not mean that so long as something is provided in the form of law it satisfies the requirement of this provision. Even though it is stipulated by law, if the content of the law is against the basic constitutional principles of modern democratic states, the law violates Article 31. And this applies not only to procedural law but also to substantive law, and not only to criminal cases but also to other cases where state power infringes the rights and interests of individuals.

*Id.* at 1582.

<sup>32</sup> 367 U.S. 497, 542 (1961).

The concept of due process may well play an even more important role in Japan than it has in the United States in light of the historical development of Japanese society.

### III. THE FUTURE ROLE OF DUE PROCESS

When the Japanese Constitution was drafted by the General Headquarters staff, the officers in charge were particularly conscious of the American experience with the problems of constitutional interpretation. They knew how the United States Supreme Court had denied the validity of laws required by changing social conditions, and how severely the Court had been criticized by scholars and law-makers sympathetic to such reform legislation for the conservative way it had handled the due process clause. The American lawyers drafting the Japanese Constitution gave serious consideration to this history and inserted into Chapter III, affirming the "Rights and Duties of the People," positive recognition of governmental power to control individual economic freedom in the interests of the public welfare. For example, Article 27(2) provides that the "Standards for wages, hours, rest and other working conditions shall be fixed by law." Thus legislators are clearly free under the Constitution to regulate wages and working hours on the basis of economic and social conditions despite the encroachment of such laws upon the individual right of freedom of contract and there can be no constitutional challenge on this ground under either the Labor Standards Law<sup>33</sup> or the Minimum Wage Law.<sup>34</sup>

Nevertheless, the proper balance between human rights and governmental power must be sought at every stage of the historical development of society. Sometimes such human rights as freedom of expression, freedom of religion, and freedom of conscience need particularly strong safeguards against governmental encroachment; at other times material interests are similarly in need of protection.

The situation in Japan is such that stronger protection is needed for both the former human rights *and* the expression of personal rights through material interests. Professor Gellhorn's comment that the Japanese Constitution does not give sufficient protection to property rights has merit.<sup>35</sup> In addition because Japan's tradition of human freedom is not as solid as that in the United States, strong guarantees

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<sup>33</sup> *Rōdō kijunhō* (Labor standards law) (Law No. 49, 1947).

<sup>34</sup> *Saitei chinginhō* (Minimum wage law) (Law No. 137, 1959).

<sup>35</sup> W. GELLHORN, COMMENT ON THE JAPANESE CONSTITUTION (1959).

of due process are needed, although there should be some exceptions permitted because of the nature of administration.<sup>36</sup>

### A. Due Process in Land Ownership

One of the crucial questions at this time is that of land ownership. When General MacArthur proposed a constitution to the Japanese government, he included two articles which read as follows:

Article 28. The ultimate fee to the land and to all natural resources reposes in the State as the collective representative of the people. Land and other natural resources are subject to the right of the State to take them, upon just compensation therefor, for the purpose of securing and promoting the conservation, development, utilization and control thereof.

Article 29. Ownership of property imposes obligations. Its use shall be in the public good. Private property may be taken by the State for public use upon just compensation therefor.

These articles were not accepted by the Japanese government on the ground that they were too close to nationalization of land and natural resources. The Japanese government was not in favor of such a sweeping negation of private ownership. Nevertheless by now the Japanese Court should accept the basic conception of limitation of ownership incorporated in this proposal.

This idea of limited ownership was in fact acknowledged in the land reform case, *Tanaka v. Japan*.<sup>37</sup> There the former landlord whose land was bought by the state to be given to the former tenant at a very small price sued the government for just compensation, asserting that the compensation provided violated the just compensation clause of Article 29 of the Japanese Constitution.

Three different theories were suggested for sustaining the constitutionality of the land reform program. According to Professor Kawashima, the farm lands owned by large feudalistic landlords are not appropriately included in the property guaranteed by Article 29 of the Japanese Constitution. He reasons that all the modern constitutions came into existence after the abolition of feudalistic land ownership

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<sup>36</sup> M. ITÔ, TERIHÔ TETSUZUKI NO HOSHÔ (Due process of law) 112 (1966). See also M. Ono, *Keiji tetsuzuki ni kansuru kempôjô no gensoku* (Constitutional principles of criminal procedure), in 2 KEMPÔ KÔZA 238-59 (1963); K. Kawakami, *Gyôseiteki torishimari to kempô* (Administrative control and the Constitution), in 2 KEMPÔ, SÔGÔ HANREI KENKYÛ SÔSHO (Comprehensive case study series, constitutional law) 135-83 (1962).

<sup>37</sup> 7 Saikô saibansho minji hanreishû 1523 (Sup. Ct., G.B., Dec. 27, 1953); English translation in J. MAKI, *supra* note 25, at 228-52.

and therefore their guarantees apply only to the property rights of a modern capitalistic society. This theory is ingenious especially because it brings a historical perspective to bear on the interpretation of the Constitution. However, as a principle of interpretation it is not satisfactory because it lacks precision in distinguishing between feudalistic property and nonfeudalistic property. Even farm land ownership has become capitalistic and only those regulations stipulated in the civil law can be applied to land ownership in modern Japanese society.

The second theory assumes that the price paid in the land reform program is not just compensation as stipulated in Article 29, and therefore the measure is clearly contrary to that provision of the Constitution; but that nevertheless the program was to be treated as valid because land reform was laid down as an occupation policy. This theory assumes that SCAP could simply ignore any constitutional limitations in contravention of its policies. A similar reform could not be repeated by the Japanese government itself under the present Constitution but as far as the past program is concerned there would be no problem. This theory too is quite ingenious but sounds like justification for what was done by the occupation alone. It provides no legal explanation for what was subsequently done by the Japanese government under a valid constitution.

The third theory was adopted by the Japanese Supreme Court in a decision of the Grand Bench, December 27, 1953, sustaining the land reform program.<sup>38</sup> The fair value of farm land was calculated as the capitalization of actual income realized from the land. Since the income was controlled by the governmental policy regulating the price of rice and other produce, the capitalized sum was necessarily limited, and this limited sum was held to be the appropriate price of the land.

Application of this theory to other possible acts of nationalization might raise some interesting problems. Suppose for instance, the government was to restrict the dividend rate of a certain type of stock and then capitalize this rate for the purpose of buying the stock and nationalizing that particular industry. The only acceptable justification for lowering the price of the stock in this way would be another principle embodied in the Constitution, *i.e.*, the principle of social welfare embodied in Article 25. But such discriminatory regulation directed at one particular type of stock would also raise a substantial

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<sup>38</sup> *Id.*

question of equality under law, guaranteed by Article 14 of the Constitution.

### *B. Due Process in Land Use*

Achieving a proper balance between free competition (private property) and social justice (the public welfare) should be regarded as the basic ethos of the present Japanese Constitution. This idea is clearly embodied in Articles 22 and 29 of the Constitution.<sup>39</sup> The individual right of freedom to engage in economic activities is guaranteed in these articles subject to a clear limitation in the interest of the public welfare as defined by law.

Such coordination between individual freedom and social justice, achieved through law, is one of the basic purposes of present-day legislation especially in the field of economic activities. An outstanding example of this is land use control. One of the basic aspects of the land problem is that land use cannot be increased except with the social investment in transportation and other public utilities. This means that the landowner profits by a rise in the price of land which is caused not by his own work, but rather by social investment for public purposes.

Another aspect of the problem is that land at a particular location cannot be replaced by some other land; if the particular land is needed for a public purpose and the landowner does not consent to sell, it must be taken by the power of government. However, in order not to be unfair to the particular owner he must be given just compensation. Urbanization in the modern world requires stronger controls over land and the extent to which private enterprise involving land is restricted increases accordingly. There also arise new types of land use. For instance, a new law,<sup>40</sup> enacted in 1966, provides for the establishment of distribution centers outside concentrated and high traffic areas; in order to create the new distribution business area, land can be expropriated according to the Land Expropriation Law.<sup>41</sup>

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<sup>39</sup> Article 22 provides: "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."

<sup>40</sup> For the provisions of Article 29, see text accompanying note 12 *supra*.  
<sup>40</sup> *Ryūtsūgyōmu shigaichi no seibi ni kansuru hōritsu* (Law concerning zones for distribution businesses) (Law No. 110, 1966). [There is no precise English equivalent for the term translated as "distribution business." It is a general term, including within its scope both warehouses and passenger and freight transportation terminals. —Ed.]

<sup>41</sup> *Tochi shūyōhō* (Law No. 219, 1951, as amended, Laws No. 73, 74, 1967).



We have to be careful in coordinating the interests of the public and the private property owner. Land reform in Japan transferred large land holdings from the feudalistic landowners to free working farmers thus stimulating their interest in greater production. This land transfer was one of the reasons for the rapid economic development in post-war Japan. However, land values in urbanized areas can be increased not so much by the work of the landowner as by public investment in utilities. Urban land use can therefore properly be restricted much more severely than farm land use.

However, if the restriction affects only a particular group of people, they should be justly compensated for their loss. Let us consider, for instance, the new City Planning Law.<sup>42</sup> According to this law the city planning area is to be divided into urbanized and controlled urbanization areas. The City Plan will include establishments such as roads, railroads, terminals, parks, waterways, schools, houses, and distribution business<sup>43</sup> areas. Development activity is not to be permitted in the controlled urbanization area, unless the plan fits the conditions set forth in the law.

This kind of restriction may cause quite a difference in the price of the land in each of these two areas. The control of real property for the sake of the public welfare is necessary, but if it causes inequality among landowners, those who suffer economically should be justly compensated.<sup>44</sup>

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<sup>42</sup> The City Planning Law (Law No. 100, 1968) revised the outdated City Planning Law of 1919.

<sup>43</sup> There is no precise English equivalent for the Japanese term translated as "distribution business." See note 40 *supra*.

<sup>44</sup> Comparable American cases recognizing the principle that land restrictions may conceivably bear so heavily on particular landowners that compensation is required either under the just compensation clause or the due process clause are *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (dicta); *United States v. Central Eureka Mining Co.* 357 U.S. 155 (1958) (dicta); *United States v. Causby*, 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The above is more the exception than the rule, however. Since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) the United States Supreme Court has recognized the right of states, under their police power, to enact reasonable restrictions upon a landowner's use of his property. The limit on the exercise of such land use regulations is that they cannot so restrict the use of land as to render it valueless. See 8 E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 25.45 at 117 (3d ed. rev. 1965). However, it is well established that the due process clauses of the American constitution do not guarantee to the landowner the most profitable use of his land, even if the restriction thus imposed deprives the landowner of a substantial potential profit. A number of cases go quite far in upholding such restrictions. See, e.g., *Carlson v. Bellevue*, 73 Wash. Dec. 2d 40, 435 P.2d 957 (1968); *Baltimore v. Borinsky*, 239 Md. 611, 212 A.2d 508 (1965).

In recent American thought, it has been suggested that zoning is not always the most appropriate method of regulation, and that in some cases condemnation of development rights in the land would be more just. See generally, Eveleth, *An Ap-*

The same is true in the case of a bill which, if enacted, would establish a basic plan for land utilization whereby each land utilization area is to be divided into various sections with an appropriate land use for each section designated. There is no stipulation regarding compensation even though a tract of land is designated as a "green section,"<sup>45</sup> except that the landowner may ask for the purchase of it by the government.

It is not easy to give fair treatment to everyone in such complex situations but the aim of the law is to provide equal treatment, without any discrimination. Equality is also guaranteed in Article 14 of the Constitution where it is stipulated that "[a]ll of the people are equal under the law." Consequently, if a law does create inequality or discrimination without justification, it should be judged unconstitutional as contravening Articles 14 and 31. Article 31 should serve as the basic bulwark against any kind of discriminatory, unreasonable and unfair encroachment upon the fundamental human rights guaranteed under Japan's democratic form of government.

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*praisal of Techniques to Preserve Open Spaces*, 9 VILL. L. REV. 559 (1964); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

<sup>45</sup> The term "Green section" (*Ryoku chi*) is used in various laws, such as *Toshi keikakuhō* (City planning law) arts. 8, 1, 11, 11(2) (Law No. 100, 1968), and *Toshi kōenhiō* (City park law) art. 2 (Law No. 79, 1956). It is an area very much like a park, but it also means the "Green Belt" area where, in order to preserve trees in the city, construction of buildings is controlled by government.

